Leow Kooi Wah v Ng Kok Seng Philip & Anor

HIGH COURT (SHAH ALAM) — DIVORCE PETITION NO 33-54-90
MAHADEV SHANKAR J
13 SEPTEMBER 1994

Family Law *— Divorce — Application for ancillary reliefs after decree nisi made absolute — Claim for lump sum payment in addition to maintenance — Whether allowable — Factors to be considered in deciding whether to order a lump sum payment — Law Reform (Marriage and Divorce) Act 1976 ss 79, 80, 93 & 94 — Divorce and Matrimonial Proceedings Rules 1980 r 56(2)*

Family Law *— Divorce — Adultery — Whether petitioner entitled to claim damages from co-respondent on account of adultery — Law Reform (Marriage and Divorce) Act 1976 ss 58(3)(b) & 59(1)*

Family Law *— Divorce — Procedure — Affidavits — Whether petitioner entitled to cross-examine respondent and co-respondent on their affidavits — Divorce and Matrimonial Proceedings Rules 1980 r 65(5)*

This is a claim by the petitioner, by way of ancillary relief, for a lump sum payment of RM135,000 in maintenance and for costs against her husband ('the respondent') and for damages of RM200,000 against the co-respondent. In August 1989, the petitioner filed an application in the Kuala Lumpur High Court for maintenance and custody of both her children. In May 1990, she filed her petition for divorce on grounds of adultery in the High Court at Shah Alam. In January 1991, the Kuala Lumpur High Court granted the petitioner custody of both her children but directed her claim for maintenance to be filed in the Petaling Jaya Magistrates' Court, which the petitioner did. At the hearing of this divorce petition on 24 March 1991, the judge made the decree nisi to be made absolute in three months but ordered that the claim for ancillary relief be dealt with on a date to be fixed. The petitioner's claim for maintenance in the magistrates' court was unsuccessful because she could not get a date before the decree nisi was made absolute on 1 July 1991. Subsequently, the petitioner filed her application for this claim in the High Court. She also filed a second application that the respondents be present at the hearing of her application for ancillary reliefs so that they could be cross-examined on their affidavits. The respondents resisted this second application on the grounds, inter alia, that the petitioner had to prove her case and in order to do so, she could not cross-examine the respondents on their affidavits in opposition. Counsel for the respondents also implied that as they had not read out their affidavits in court, they were not in evidence and that after the petitioner had led *viva voce* evidence, the respondents could elect not to give evidence.

Held, allowing the petitioner's application in part:

(1) Since adultery had been proved, the petitioner was eligible to damages against the co-respondent. The quantum of such damages will depend on all the circumstances of the case and, though compensatory, are not restricted to pecuniary loss. Since the co-respondent knew that the petitioner and the respondent were married when she committed adultery with the respondent, that was an aggravation to be taken into account. The value of the spouse and the injury to the aggrieved spouse's feelings vary from case to case because such damages will be impossible to establish mathematically.

(2) Although there is no provision in the Law Reform (Marriage and Divorce) Act 1976 ('the Act') which expressly permits a lump sum payment in addition to maintenance, s 80 covers the situation where the parties may agree to the payment of a lump sum in cash or kind in lieu of periodic payments subject to court approval. In the absence of agreement, the court has the power by s 79 of the Act to order security for maintenance by vesting property in trust to pay such maintenance. As for children, s 93 gives the court power to order maintenance and s 94 is in the same terms as s 79. Where the spouse has capital assets, the court can direct that it be used to secure the periodical payments ordered.

(3) In quantifying the maintenance payable, the court is required by s 78 of the Act to base its assessment on the means and needs of the parties, regardless of the proportion such maintenance bears to the parties' income but having regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage. There was no rule that the petitioner was only entitled to one-third of the combined incomes of the petitioner and respondent as argued by the respondents' counsel.

(4) The affidavits filed by the petitioner and respondents became part of the court record and therefore an integral part of the evidence the moment they were filed. The petitioner's affidavits were sworn depositions and she was entitled to ask the court to rely upon them. She was also entitled to cross-examine the respondents on their affidavits on matters relevant to her claims for maintenance and on the damages she claimed from the co-respondent.

(5) As an interim measure, the respondent was ordered to pay RM2,500 (RM100 per month) in maintenance for the petitioner's daughter from December 1988 till December 1990 and RM8,400 (RM200 per month less RM600 already paid by the respondent) towards the maintenance of both the petitioner's children from January 1991 till September 1994. All costs incurred by the petitioner to date including the costs of extracting the order

pursuant to this judgment were to be taxed and paid by the respondent. A

[Bahasa Malaysia summary

Ini adalah suatu tuntutan oleh pempetisyen, melalui cara relief sampingan, untuk suatu bayaran sekaligus sebanyak RM135,000 nafkah dan kos terhadap suami beliau ('responden') dan untuk ganti rugi sebanyak RM200,000 terhadap responden bersama. Pada Ogos 1989, pempetisyen telah memfailkan suatu permohonan di Mahkamah Tinggi Kuala Lumpur untuk nafkah dan jagaan kedua-dua anak beliau. Pada Mei 1990, beliau telah memfailkan petisyennya untuk perceraian atas sebab zina di Mahkamah Tinggi di Shah Alam. Pada Januari 1991, Mahkamah Tinggi Kuala Lumpur telah memberikan pempetisyen jagaan kedua-dua anak beliau tetapi mengarahkan tuntutan beliau untuk nafkah difailkan di Mahkamah Majistret Petaling Jaya, dan pempetisyen telah berbuat demikian. Pada pembicaraan petisyen perceraian ini pada 24 Mac 1991, hakim telah membuat dekri nisi yang akan dijadikan mutlak dalam tempoh tiga bulan tetapi memerintahkan supaya tuntutan untuk relief sampingan itu dibicarakan pada satu tarikh yang akan ditetapkan. Tuntutan pempetisyen untuk nafkah di mahkamah majistret tidak berjaya oleh sebab beliau tidak dapat memperolehi satu tarikh sebelum dekri nisi itu dijadikan mutlak pada 1 Julai 1991. Seterusnya, pempetisyen memfailkan permohonan beliau untuk tuntutan ini di Mahkamah Tinggi. Beliau juga memfailkan permohonan kedua supaya responden-responden menghadiri pembicaraan permohonan beliau untuk relief sampingan supaya mereka boleh diperiksa balas atas afidavit mereka. Responden-responden menentang permohonan kedua itu atas alasan, antara lain, bahawa pempetisyen perlu membuktikan kes beliau dan untuk berbuat demikian, beliau tidak boleh memeriksa balas responden-responden atas afidavit mereka yang telah difailkan untuk menentang permohonan beliau. Peguambela untuk responden juga mencadangkan secara tidak langsung bahawa memandangkan mereka belum membaca afidavit mereka di mahkamah, ianya tidak menjadi sebahagian daripada keterangan dan bahawa setelah pempetisyen memberikan keterangan *viva voce,* responden-responden boleh memilih untuk tidak memberi keterangan. B C D E F G

Diputuskan, membenarkan sebahagian daripada permohonan pempetisyen itu: H

(1) Memandangkan zina telah dibuktikan, pempetisyen adalah layak untuk mendapatkan ganti rugi terhadap responden bersama. Kuantum ganti rugi sedemikian akan bergantung pada semua keadaan kes itu dan, walaupun ianya adalah bayaran pampasan, ia tidak terhad kepada kerugian wang. Memandangkan responden bersama tahu bahawa responden dan pempetisyen telah berkahwin apabila beliau melakukan zina dengan responden, itu adalah satu I

perkara yang memperburuk yang perlu dipertimbangkan. Nilai pasangan itu dan luka kepada perasaan pasangan terkilan berbeza dari kes ke kes kerana ganti rugi sedemikian tidak mungkin dapat ditentukan secara matematik.

(2) Walaupun tidak terdapat peruntukan dalam Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta itu') yang secara nyata membenarkan suatu bayaran sekaligus di samping nafkah, s 80 merangkumi keadaan di mana pihak-pihak terlibat boleh bersetuju supaya suatu pembayaran sekaligus dibuat dalam bentuk wang tunai atau bukan dalam bentuk wang sebagai ganti bayaran berkala tertakluk kepada kebenaran mahkamah. Dengan tiadanya persetujuan, mahkamah mempunyai kuasa di bawah s 79 Akta itu untuk memerintahkan jaminan untuk nafkah dengan meletak hak harta dalam amanah untuk membayar nafkah sedemikian. Berkenaan dengan kanak-kanak, s 93 memberi mahkamah kuasa untuk memerintahkan nafkah dan s 94 adalah diistilahkan sama seperti s 79. Di mana ia ditunjukkan bahawa pasangan itu mempunyai aset modal, mahkamah boleh mengarahkan supaya ia digunakan untuk menjamin bayaran berkala yang telah diperintahkan.

(3) Dalam menyatakan kuantiti nafkah yang perlu dibayar, mahkamah adalah dikehendaki oleh s 78 Akta itu untuk berdasarkan taksirannya atas kemampuan dan keperluan pihak-pihak itu, tanpa menghiraukan perkadaran nafkah sedemikian berbanding dengan pendapatan pihak-pihak itu tetapi dengan mengambil berat terhadap tahap tanggungjawab yang mahkamah mengagihkan kepada setiap satu pihak untuk kegagalan perkahwinan itu. Tidak terdapat peraturan bahawa pempetisyen hanya berhak untuk mendapat satu pertiga daripada jumlah pendapatan bergabung pempetisyen dan responden sepertimana yang telah dinyatakan oleh peguambela responden-responden.

(4) Afidavit yang difailkan oleh pempetisyen dan responden-responden telah menjadi sebahagian daripada rekod mahkamah dan dengan itu suatu bahagian penting keterangan sebaik sahaja mereka difailkan. Afidavit pempetisyen adalah deposisi bersumpah dan beliau berhak meminta mahkamah bergantung pada mereka. Beliau juga berhak memeriksa balas responden-responden atas afidavit mereka dalam perkara-perkara yang relevan kepada tuntutan beliau untuk nafkah dan atas ganti rugi yang beliau menuntut daripada responden bersama.

(5) Sebagai suatu tindakan interim, respondent telah diperintahkan membayar RM2,500 (RM100 sebulan) sebagai nafkah untuk anak perempuan pempetisyen dari Disember 1988 hingga Disember 1990 dan RM8,400 (RM200 sebulan kurang RM600 yang telahpun dibayar oleh responden) terhadap nafkah kedua-dua anak pempetisyen dari Januari 1991 hingga September 1994. Semua kos yang ditanggung oleh pempetisyen setakat ini termasuk

kos mengambil perintah di bawah penghakiman ini perlu ditetapkan dan dibayar oleh responden.]

Notes

For cases on divorce, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1859–1985.

Cases referred to

Butterworth v Butterworth & Anor [1920] P 126 (refd)
Lee Puay Hwa v Way Cheow Seng [1991] 3 MLJ 1 (refd)
Lindwall v Lindwall [1967] 1 All ER 470; [1967] 1 WLR 143 (follld)
Rodewald v Rodewald [1977] 2 All ER 609; [1977] 2 WLR 191 (not follld)
Tan Kay Poh v Tan Surida & Anor [1989] 1 MLJ 276 (refd)
Thevathason v Thevathason [1960] MLJ 255 (not follld)
Wachtel v Wachtel [1973] 1 All ER 829; [1973] 2 WLR 366 (not follld)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980 rr 56(1), (2)(a), (2)(c), 63(2)
Law Reform (Marriage and Divorce) Act 1976 ss 58(3)(b), 59(1), (3), 65(5), 79, 80, 93, 94
Matrimonial Proceedings and Property Act 1970 s 2 [UK]
Women's Charter (Cap 353, 1985 Ed) s 109(1) [Sing]

SY Chew (*SY Chew & Co*) for the petitioner.
Gurbakhash Singh (*Gurbakhash & Tan*) for the respondents.

Cur Adv Vult

Mahadev Shankar J: This is a claim by the wife (petitioner) ('P') by way of ancillary relief for a lump sum payment and for maintenance against her husband ('R') and for damages against the co-respondent ('CR').

P married R in 1977. P is a teacher. R was in advertising. They have two children, a son born in 1981 and a daughter born in 1984. In 1986, P bought a house in Petaling Jaya. This house became their matrimonial home. The house cost RM95,000. P took out a government loan of RM91,000. To cover the balance, P took out her EPF moneys of RM7,000. The house was entirely paid for by P. P says the balance of RM3,000 was taken by R. Every month RM482.12 is deducted from P's salary as loan repayment to the government. As at May 1992, P has still 20 years to go to effect full repayment, and at this point in time the house is being rented out for RM400 per month. P pays all the assessment, quit rent and repairs.

Sometime in 1986, P stated she found out that R was 'having an illicit intimate relationship' with CR. P stated she 'continued to cohabit with R as she could not do anything to stop the relationship'. P has averred

A that CR had accompanied the family to church, to the zoo and Cameron Highlands and that on these occasions she could see that something was brewing. CR does not deny that a relationship was developing between herself and R. CR must have known that R was a married man with young children, but she did nothing to repel R's advances. Indeed in August
B 1988, R brought CR into the matrimonial home. P found this situation intolerable and in November 1988 moved out with her daughter.

CR stayed on in the matrimonial home and had a child by R born on 28 April 1989. In the proceedings before me, R and CR have admitted the adultery alleged by P. The birth of this illegitimate child is proof that
C sexual intercourse must have taken place at least as early as July 1988. R and CR were thus living in adultery in the matrimonial home from August 1988.

R moved P's son to Singapore at the end of 1988. He put the boy up with his sisters and sent him to a school in Singapore.

D When P moved out of the matrimonial home in November 1988, she initially stayed for about a year in another house in Taman Tun Dr Ismail. Thereafter, R and CR also moved out to another house in the same street.

In August 1989, P filed an application in the Kuala Lumpur High Court for maintenance and custody of both her children. She had earlier
E applied to the conciliation tribunal where unsuccessful meetings took place from August through to December. A certificate was issued on 18 December 1989.

In May 1990, P filed her petition for divorce in this High Court at Shah Alam against R and CR. Particulars were given of how the open illicit relationship in the matrimonial home in front of P and her children caused
F great distress, pain and mental torture to P. In her petition, P claimed a lump sum and maintenance as against R and damages against CR.

In January 1991, the Kuala Lumpur High Court granted P custody of both her children but directed her claim for maintenance to be filed in the Petaling Jaya Magistrates' Court. This P did.

G In R's answer to P's petition, R admitted the adultery but claimed that P had condoned and/or encouraged the adultery and that the adultery took place only after the marriage had broken down. No particulars were supplied as to the alleged encouragement or condonation or when it was alleged that the marriage had broken down.

H CR also filed an answer admitting adultery but denying that P was entitled to damages therefor. Alternatively in the same words as R, CR pleaded encouragement/condonation, and irretrievable breakdown prior to the adultery. No particulars were given.

At the hearing of this divorce petition on 24 March 1991, counsel for
I R and CR stated that they were not contesting the adultery and that R also agreed that the marriage had broken down irretrievably. He asked that an order of dissolution be made that day and that the claim for ancillary relief including the claim for damages be postponed to a date to be fixed.

Counsel for P agreed only to the dissolution and specifically reserved P's rights arising out of or incidental to the intolerable conduct alleged. A

On this basis, I made the decree nisi to be made absolute in three months but ordered that the claim for ancillary relief be dealt with on a date to be fixed and costs be reserved and dealt with upon a final disposal of the matter. B

By this time, a second child had been born to R and CR on 7 October 1990. P's claim to maintenance in the magistrates' court came to nought because she could not get a date before the decree nisi was made absolute on 1 July 1991. She was no longer legally married to R.

So the issues of maintenance and lump sum against R and damages against CR remained to be dealt with in this court. In accordance with the Divorce and Matrimonial Proceedings Rules 1980 ('the divorce rules') r 56(2)(c), P filed her application. C

Normally, claims for such relief should be made in the petition and disposed of at the trial. In this respect, r 56(1) and 2(a) reads as follows: D

> (1) Any application by a petitioner, or by a respondent who files an answer claiming relief, for —
>
> (a) an order for maintenance pending suit;
>
> (b) a property division order, under section 76 of the Act; or
>
> (c) a maintenance order, under section 77 of the Act,
>
> shall be made in the petition or answer, as the case may be. E
>
> (2) Notwithstanding paragraph (1), an application for ancillary relief which should have been made in the petition or answer may be made subsequently— F
>
> (a) by leave of the Court, either by notice in Form 11 or at the trial;

Clearly, the words of r 56(2)(a) allows the claim to be made at a point in time subsequent to the petition. Although it would have been preferable to deal with this before the decree absolute, I do not think anything turns on this. Besides, the claim P was making was the subject of her petition where G P quantified her claim for maintenance for herself *and* her two children at RM848 per month, the lump sum at RM135,000, the damages payable by CR at RM200,000, with the costs to be paid by R. These figures were repeated in the application in Form 11 (encl 24).

The application was supported by P's affidavit. She gave details of H CR's conduct with R prior to P's departure from the matrimonial home. She gave details of her salary at RM890 per month, and a breakdown of her monthly expenses for herself and her two children at RM1,126 per month. She also gave details of:

(a) her lifestyle during the subsistence of the marriage; I

(b) the income and assets of R and CR to the extent she was able; and

(c) the basis of her claim for damages.

A This claim and affidavit was served months before the hearing. R and CR each filed an affidavit disputing P's claims and served P only a few days before the hearing thus forcing an adjournment. Rule 63(2) of the divorce rules requires service 14 clear days before the hearing. P needed time to reply.

B In his affidavit, R claimed he had no assets and that his only income was a salary of RM1,768.25 as a salesman. He said his monthly expenditure was RM1,942.38. He says he had earlier agreed to pay RM200 per month as maintenance, did so for three months and stopped because P had denied him access to the children. He now proposes that he pay RM200 per month. P had given details of other business in which R was involved C and these he denied.

CR's affidavit was to the effect that the marriage had broken down before the adultery, that P had known and consented to CR's relationship with R, that the advertising firm she was running was a failure and ceased in 1989, that she had no assets whatsoever and was now a full-time D housewife.

P was not prepared to accept these affidavits. She filed a reply affidavit giving details of R's business activities and interests which, to say the least, put the alleged quantum of his gross emoluments in some doubt. She also adduced some evidence to show that CR and R had a business E association.

In addition, P filed a second application that R and CR be present at the hearing of her application for ancillary relief so that they may be cross-examined on their affidavits. In the supporting affidavit to this application, P said that unless the court has all the relevant information on R's assets and income, a just decision could not be made.

F Both applications came on for hearing together. P's counsel wanted to cross-examine first and then let the court decide on the issue of ancillary relief on the *viva voce* evidence.

Counsel for R and CR resisted the application for leave to cross-examine. He submitted that:

G

(a) in law, P was not entitled to any damages from CR but if such damages were payable, they should be compensatory only;

(b) in law, P was not entitled to any lump sum payment from R;

(c) P was only entitled to maintenance and as to this, R should only pay H RM200 per month;

(d) P had to prove her case first by giving evidence;

(e) P should not be allowed to make out her case by forcing R and CR into the witness box for cross-examination; and

(f) that if R and CR refused to give evidence the court must decide on I the affidavits filed and the law.

P's counsel submitted that she was entitled to all the relief she claimed and to cross-examine as well.

Can a petitioner/wife get damages from a co-respondent?

Both in her petition and in her application (encl 24), P has asked the court 'to condemn' CR for RM200,000 in damages.

CR's counsel correctly submitted that both in the UK and in Singapore, the right to claim such damages had been abolished.

The history of this branch of the law in the UK is fully set out in *Family Law* by PM Bromley (3rd Ed) at p 175. The position in Singapore is well covered in *Tan Kay Poh v Tan Surida & Anor* [1989] 1 MLJ 276.

He then went on to submit that we should follow suit by giving nominal damages only, if not in every case then at least in this one.

In the UK, the husband alone could claim damages for adultery. At common law, the wife was treated as the husband's chattel, and this cause of action was based on his quasi-proprietary interest in his wife.

The measure of damages where a husband/petitioner is making the claim is dealt with in *Bromley* at pp 175–178. The author has summarized the principles laid down by McCardie J in *Butterworth v Butterworth & Anor* [1920] P 126 at p 26 under four heads:

(1) the value of the wife;

(2) injury to the husband's feelings;

(3) co-respondent's means and conduct; and

(4) co-respondent's knowledge that the wife was married.

Until 1970 in the UK, these damages could be claimed by a husband as of right. The court had to grant such general and special damages as were proved.

The customary law of Malaysians who were not of the Christian faith permitted a multiplicity of wives. The Law Reform (Marriage and Divorce) Act 1976 ('the Act') was therefore a radical departure from tradition because it sought to achieve a feat of social engineering in enforcing monogamy by statutory coercion. However, the legitimacy of polygamous marriages contracted before the Act came into force was specifically provided for.

Section 58 of the Act reflects this cultural climate. Initially a wife/petitioner could only make an alleged adulteress a co-respondent if the court so directed, whereas a petitioning husband was required to name the co-respondent. This anomaly was rectified by the amending Act A498 in 1982.

Sections 58(3)(b) and 59(1) of the Act read as follows:

> 58(3)(b) ... if, at the conclusion of the hearing, the court is satisfied that adultery between the respondent and co-respondent has been proved, the court may award the petitioner such damages as it may think fit, but so that the award shall not include any exemplary or punitive element.

A 59(1) The court may award damages against a co-respondent notwithstanding that the petition against the respondent is dismissed or adjourned.

The use of the word 'may' twice in s 58(3)(b) shows that the petitioner/husband or wife is only eligible to claim for damages, as opposed to being B entitled to them as of right. Even where such damages are proved, the court has a discretion to award such damages as it thinks fit.

In the light of the language of our statute, it is out of place for petitioners to request that the co-respondent 'be condemned' because this would be punitive. The criteria set out by McCardie J in *Butterworth v* C *Butterworth* is therefore only a useful guide. It cannot be applied across the board.

Section 59(3) of the Act is anomalous in that it only gives power to order the co-respondent to pay the costs of the proceedings where the petition is presented by the husband. This point does not arise here because P has only asked for costs against R.

D

The conclusion on this issue is that since adultery has been proved, P is eligible to damages against CR. The quantum of such damages will depend on all the circumstances of the case. Such damages, though compensatory, are not restricted to pecuniary loss. Since CR knew P and R were married when she committed adultery with R, that is an aggravation E to be taken into account. The value of the spouse and the injury to the aggrieved spouse's feelings will vary from case to case, because such damages will be impossible to establish mathematically.

Is P entitled to a lump sum payment in addition to maintenance?

F Both in the petition, and in her application, P has asked for RM135,000 as a lump sum payment by R.

R's counsel has relied on *Wachtel v Wachtel* [1973] 1 All ER 829 at p 840; [1973] 2 WLR 366 at p 377 to show that in the UK a wife could only obtain this when s 2 of the English Matrimonial Proceedings and G Property Act 1970 came into force. In Singapore, s 109(1) of the Women's Charter (Cap 353, 1985 Ed) permitted a lump sum or periodical payments to be provided for in a maintenance order. (See *Lee Puay Hwa v Way Cheow Seng* [1991] 3 MLJ 1 at p 3.)

R's counsel submits this court has no jurisdiction to make a lump sum payment because there is no statutory provision to that effect. In any H case, he submits that if the husband has no assets, then in line with the cases aforesaid, no lump sum should be ordered.

Admittedly, there is no parallel provision in the Act in pari materia with the UK or Singapore legislation. But the effect of our Act comes very nearly to the same thing. Section 80 of the Act covers the situation where I the parties agree to the payment of a lump sum in cash or kind in lieu of periodic payments. Such agreement is subject to court approval. In the absence of agreement, the court has the power by s 79 of the Act to order

security for maintenance by vesting property in trust to pay such maintenance. The property could be a capital sum in money. Sections 79 and 80 come under the head of 'Maintenance of spouse'. As for children, s 93 gives the court power to order maintenance and s 94 is in the same terms as s 79.

Where it is shown that the spouse has capital assets, I hold that the court can direct that it be used to secure the periodical payments ordered. The desire for a clean break may well precipitate an agreement under s 80 of the Act.

How should the court quantify the maintenance payable?

Relying on *Wachtel v Wachtel, Thevathason v Thevathason* [1960] MLJ 255 and *Rodewald v Rodewald* [1977] 2 All ER 609; [1977] 2 WLR 191, R's counsel says there is a usual one-third rule. He adds P's earnings of RM900 per month to R's alleged earnings of RM1,800 per month to get RM2,700 and says since P is already earning RM900 per month, she has no right to more. R (presumably as an alleged act of grace) is offering RM200 per month and says he requires RM1,600 to maintain himself, CR and their two children.

I regret to say that this approach is totally misconceived bearing in mind the words of s 78 of the Act. It reads:

> In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties, *regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be* but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage. (Emphasis added.)

Besides, we have to consider maintenance for P as spouse and also maintenance for P's children by R.

How should P prove her claims for ancillary relief?

I have had some difficulty in discovering where exactly counsel for R and CR was trying to lead me on this issue. He said P had to prove her case and in order to do so she could not cross-examine R and CR on the affidavits they had filed in opposition to P's application. He also implied that as he had not read out their affidavits in court, they were not in evidence and that after P had led *viva voce* evidence, in addition to her affidavits in support of her applications, R and CR could elect not to give evidence. In effect, he was contending that their right to refuse to give evidence should not be prejudiced by forcing them into the witness box.

With respect, this submission runs completely contrary to the letter and spirit of the divorce rules. I have already referred to r 56 on the power to postpone such applications. Where such an application is made, there is a unilateral duty upon the respondent to file an affidavit in answer containing

full particulars of his property and income (see r 61). Rule 65(5) reads as follows:

> At the hearing of an application for ancillary relief the registrar shall, subject to Rules 66, 68 and 69, investigate the allegations made in support of and in answer to the application and may take evidence orally and may order the attendance of any person for the purpose of being examined or cross-examined, and may at any state of the proceedings order the discovery and production of any document or require further affidavit.

These matters have come before me and not the registrar because that is the route counsel for both parties took when the decree nisi was made. I hold that the affidavits filed by the petitioner in support of her applications and the affidavits filed by R and CR in opposition thereto became part of the court record and therefore an integral part of the evidence the moment they were filed because they are then read by the judge before the case is heard in the presence of the parties and their counsel.

It is to be noted here that a claim for damages in a sense overlaps a claim for maintenance for the aggrieved spouse or children because by s 59 of the Act, the court can direct the damages to be vested in trustees to pay the children or the petitioner.

In these circumstances, it is idle to contend that P cannot now rely upon admissions made by R and CR in their pleadings and in their affidavits. P's affidavits are sworn depositions and she is entitled to ask the court to rely upon them. If that is all the evidence she wishes to tender on her behalf, I hold she is free to do so.

I also hold she is entitled to cross-examine R and CR on their affidavits on matters relevant to her claims for maintenance for herself and her children and on the damages she claims from the co-respondent. As a matter of interest, the position in the UK is that a party could not be denied the right to cross-examine in applications for maintenance. (See *Lindwall v Lindwall* [1967] 1 All ER 470; [1967] 1 WLR 143 and the commentary in 1 *Supreme Court Practice 1979* at para 38/2/3.)

Consequently, I now order that P be given leave to cross-examine both R and CR on the affidavits they have filed and I direct that both of them do appear for that purpose on a date to be fixed. Should they refuse, I direct that their affidavits be disregarded except for such admissions therein as P wishes to rely upon in support of her claim.

From the date P left the said house, all R says he paid were three instalments of RM200 each. He then stopped, he says, because he could not get access to his children by P. If he wanted access, R could have applied to court. He did not and this excuse does not hold water. P's son was with R up till 21 January 1991 when NH Chan J gave her custody of both children.

R has therefore not satisfied his liability to maintain his daughter from November 1988. He has neglected to maintain both his children by P from January 1991. Purely as an interim measure, I now order that R shall pay RM2,500 (calculated at RM100 per month) towards the

maintenance for P's daughter from December 1988 till end December 1990 and RM8,400 towards the maintenance of both P's children from January 1991 till end September 1994 (calculated at RM200 per month less RM600 paid by R). I must make clear that these payments are ordered as an interim measure only towards P's claims.

This court will decide the final amounts to be paid after it has heard such further evidence as the parties wish to adduce by way of cross-examination or otherwise. I hold that where both parents are earning, both have a liability to maintain their children, each according to his or her means. The quantum of maintenance to be paid to P is a separate issue.

This is the right time for me to order that all costs incurred by the petitioner to date including the costs of extracting the order pursuant to this judgment to be taxed and paid by the respondent.

Order accordingly.

Reported by Sarojah Arianayagam